Date: June 5, 1997

Case No.: 95-INA-355

In the Matter of:

BYBLOS,
Employer

On Behalf Of:

ZIAD KHEIREDDINE ISLAMBOULI,
Alien

Appearance: George Shalhoub, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 1, 1993, Byblos ("Employer") filed an application for labor certification to enable Ziad Islambouli ("Alien") to fill the position of Musician (Instrumental) Arabic Hand Held Drum (AF 101). The job duties for the position are :

> Play hand held drum (one quarter tone Middle Eastern musical instrument) in musical group in Middle Eastern specialty restaurant to entertain customers. Study and rehearse music to learn and interpret score. Play from memory or by following score. Accompany musicians and dancers during musical performances. Tuesday through Sunday. 4 hours rehearsal per week. Night Club seats 200 people.

The requirements for the position are four years of high school and two years of experience in the job offered.

The CO issued a Notice of Findings on May 20, 1994 (AF 92-95). The CO proposed to deny labor certification because no clear employer/employee relationship existed and the job offered was not permanent, full-time employment.

Accordingly, the Employer was notified that it had until June 24, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 21, 1994 (AF 14-91), the Employer submitted checks made payable to the Alien. He also submitted the Articles of Incorporation for his business, as well as a copy of the Statement of Domestic Stock Corporation. Finally, the Employer submitted approved Visas for former employees. The Employer asserted that his establishment is known for its unique musical talent exemplifying the finest Middle Eastern musicians. Furthermore, the Employer noted that his business is a Night Club that serves food and most of his income is derived from the entertainment.

The CO issued the Final Determination on (AF 11-13), denying certification because the Employer failed to show that an employer/employee relationship exists, as he did not establish that the job offered is a full-time permanent position.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On September 26, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-3). In March 1995 the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.,* 88-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.,* 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 94). First, the CO questioned the Employer's assertion that the Alien worked for the Employer from 1990 to 1993, as the Alien was not listed on his payroll tax records. Therefore, the CO requested that the Employer explain the discrepancy. Second, the CO found that there was no clear opening for a U.S. worker. He further questioned the nature of the employer/employee relationship and whether the job offer was a *bona fide* offer for a full-time permanent position. As such, the CO requested that the Employer: (1) show who has been performing the musician work until now and document how the musicians have been paid; (2) document employee status by providing copies of W-2 forms; (3) show if the musical entertainment has been full time until now; and, (4) show that the other musicians are employees, not independent contractors. Furthermore, the CO instructed the Employer to show that the job is not reserved for the Alien and that the Alien has no ownership interest in the business. Specifically, the CO asked the Employer to submit the Articles of Incorporation and the Alien's relationship to any corporate officers.

In rebuttal the Employer submitted copies of paychecks to the Alien covering a period from April 1992 until September 1993 (AF 32-90). Furthermore, the Employer asserted that his establishment is known for its unique musical talent exemplifying Middle Eastern musicians (AF 14-15). He explained that his business is a Night Club that serves food and most of his income derives from entertainment and not from the food. As such, the musician's salary differs from the other employees in the establishment. The Employer also enclosed copies of past Visa approvals for musicians employed full time in the restaurant (AF 20-31). Finally, the Employer stated that the Alien has no ownership interest in the company and is not related to anyone who has such an interest (AF 14-15). In accordance with the CO's request, the Employer submitted the Articles of Incorporation, as well as a copy of the Statement of Domestic Stock Corporation (AF 17-19).

In the Final Determination, the CO continued to find that the Employer failed to establish a *bona fide* employer/employee relationship as the Employer did not establish that a permanent, full-time position exists (AF 11-13). We agree with the CO for several reasons. First, we note that the Alien, on his ETA 750B form, asserted that he worked for the Employer from February 1990 through March 1993 (AF 135). The CO questioned this assertion and the Employer submitted checks written to the Alien; however, they only show employment from April 1992

through September 1993 (AF 32-90). As such, we find the Alien's assertions suspect. Second, the Employer submitted several Visa applications for other employees (AF 20-31). However, it is not evident that these individuals were employed as musicians. Finally, the Employer ignored several of the CO's requests. Specifically, the Employer did not do any of the following: document how the musicians have been paid, document the employees' status by providing copies of forms W-2, show that the musical entertainment has been full-time up until now or show that the other musicians are employees and not independent contractors.[2]

An employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988). Furthermore, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, supra.* Based on the foregoing, we find that the Employer's rebuttal does not meet his burden of establishing an employer/employee relationship or that the job offered is permanent and full time. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

[2] We note that the Employer supplied additional evidence in the Request for Review. However, it is well settled that evidence first submitted with the Request for Review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 90-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991). The CO clearly presented the issues in the NOF and the Employer had every opportunity to present all relevant evidence in his rebuttal.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.